BEFORE THE THREE MEMBER DUE PROCESS PANEL
EMPOWERED BY THE MISSOURI STATE BOARD OF EDUCATION
PURSUANT TO SECTION 162.961 RSMo.

,)
Petitioner,)
)
vs.)
)
BLUE SPRINGS R-IV SCHOOL DISTRICT,)
Respondent.)

COVER SHEET

1. Parties

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Date of Due Process Hearing Request: **May 26, 2005**

Dates of Due Process Hearing: **September 18 - 22, 2006**

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vs.	)
BLUE SPRINGS R-IV SCHOOL DISTRICT,	)
Respondent.	)

FINDINGS OF FACT, CONCLUSIONS OF LAW,
DECISION AND ORDER

The Hearing Panel, after hearing and giving appropriate weight to the evidence in this matter, makes the following Findings of Fact and Conclusions of Law and issues the following Decision and Order:

I. Issues and Purpose of the Hearing

Petitioner raised the following issues in his Amended Statement of Issues, which were addressed at the hearing:

1. "The school failed to properly evaluate and fully identify Student's needs and thereafter failed to craft and appropriately draft an IEP for the 2003, 2004 and current school year [i.e. meaningful baseline data or present levels of educational performance are absent, the IEP lacks sufficiently measurable annual goals and short-term objectives and the result and program fails to provide adequate, related and support services], denying him a free appropriate public education. The types of violations alleged here are similar to those condemned in *Cleveland Heights- University Heights Sch. Dist. v. Boss*, 144 F.3d 391, 398-399 (6th Cir. 1998). See also *Rowley at 181-182*.

2. "The School failed to provide the parents adequate prior written notice of their decisions during the past three (3) years beginning in the fall of 2003 in violation of

20 U.S.C. Section 1415(b) and (C) and 34 C.F.R. Section 300.503." See *Tenn. Dept. of Mental Health v. Paul B.*, 88 F.3d 1466 (6th Cir. 1996).

3. "The School failed to provide necessary special education and related services for the past three school years beginning in the fall of 2003 despite the Student's entitlement to these services, including, but not limited to one on one ABA type services and in so failing denied this Student a free appropriate public education requiring the parents to obtain these services privately and at their own expense. In particular, the School fails to address Student's behavior needs and social and emotional needs." See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

4. "Over the same time period set forth above, the School denied the parents the right to participate as equal partners in the IEP process by failing to fairly consider the parents repeated requests in violation of *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 206-207 (1982), *Dov. Hamilton Co. Bd. of Educ.*, 392 F.3d 840, 858 (6th Cir. 2004), and *Independent Sch. Dist. No. 283 v. S.D.*, 88 F.3d 551, 562 (8th Cir. 1996) which held that procedural violations occurred demanding relief 'when the parents opportunity to participate in the IEP process is seriously hampered'."

5. The Petitioner proposed the following remedies :

A. "A finding that the School denied this Student a free appropriate public education for the 2003, 2004, 2005 and present school year;"

B. "A finding that the parents are entitled to reimbursement for certain out-of-pocket educational expenses, including the cost of evaluations and the cost for services they provided during the 2003, 2004, 2005 and present school year;"

C. "A finding that the parents are the prevailing party;"

D. "A finding recognizing the Petitioner's right to reimbursement for perfecting this action, including reimbursement for attorney's fees."

II. Procedural History and Time Line Information

On May 26, 2005, the Parents, through their attorney, requested a due process hearing from the Missouri Department of Elementary and Secondary Education (DESE).

On June 6, 2005, Pam Williams, Director for Special Education Compliance at DESE, notified the Chairperson of assignment to serve on the due process hearing panel to hear the parents' claims.

On June 13, 2005, the Chairperson informed the parties, via letter, that a hearing must be held and a written decision rendered on or before July 11, 2005. The Chairperson requested, in that letter, that the parties inform the Panel by June 20, 2005: how long they would need to present their respective cases; any special accommodations that were needed; any dates the parties were not available for a hearing between June 29th and July 1, 2005; and whether the parties desired to hold a pre-hearing conference to discuss problems or hear motions regarding the issues in the case.

On June 21, 2005, the Chairperson issued an Order granting the request to extend the statutory time lines and set the hearing to be heard on August 30, 2005 through September 2, 2005, with a final decision issued no later than October 7, 2005.

On June 30, 2005, Respondent, Blue Springs R-IV School District, submitted a motion for more definite statement and suggestions in support thereof whereby Respondent averred that the "indefinite and uncertain nature of Petitioner's request for due process is such that Respondent is unable to make an intelligent and meaningful

response to the claim or even address the particular concerns of Petitioner, let alone propound appropriate discovery."

On July 8, 2005 the Chairperson issued an Order finding that the due process hearing complaint was insufficient and granting the Petitioner ten (10) days to file an amended complaint.

On July 13, 2005 Petitioner filed his supplemental specification of issues in response to Order to Make More Definite.

On July 22, 2005 Respondent submitted Request for Production of Documents, Interrogatories and Request for Admissions to the Petitioner.

On August 17, 2005 Respondent requested a continuance of the procedural time line.

By Order dated August 18, 2005, the time line was extended such that the hearing was set for November 2, 2005 through November 4, 2005 with a final date of decision due on November 30, 2005.

On August 26, 2005 Petitioner submitted a "Response to Respondent's First Request for Admissions: Objection and Motion for a Protective Order."

Respondent submitted a response to Petitioner's Motion on September 2, 2005. Further, on that day Respondent submitted Motions seeking to compel a response to the Interrogatories, Request for Production of Documents and Admissions it had previously submitted to the Petitioner. Following argument by counsel via conference call on September 8, 2005 the Chairperson issued a Protective Order limiting Respondent to those avenues of discovery provided by statute or regulation.

On September 28, 2005 Petitioner submitted his Motion to Disqualify Dr. Terry Allee as panel member. Therein Petitioner alleged that Dr. Terry Allee should be disqualified from sitting on the panel because "the evidence reflects that Dr. Allee is so amerced (sic), in his own credentials he is unable to give proper weight to witnesses, most of whom may be parents, who have not attained comparable academic recognition. He has also exhibited behavior . . . that reflects his unwillingness to be bound by the decision making process imposed by law. And given his expressed opinion about one of the likely witnesses in this case, he cannot possibly be viewed as neutral."

Respondent submitted its opposition to Petitioner's Motion to Disqualify on October 5, 2005.

Subsequent thereto Dr. Terry Allee voluntarily withdrew from the Panel and George Wilson was appointed to the Panel in Dr. Allee's stead.

On October 7, 2005 the Respondent submitted its response to Petitioner's Supplemental Specification of Issues wherein it averred that "the Petitioner's Supplemental Specification of Issues failed to provide further support or clarification and did not include any specific facts as to the request for due process and only included general statements alleging the denial of free appropriate public education and other general related rights under the IDEA."

On October 14, 2005 the Chairperson entered an Order finding that Petitioner's Supplemental Specification of Issues submitted July 13, 2005 was insufficient in that "paragraph 2 fails to identify what needs should have been addressed in an appropriately drafted IEP; paragraph 3 fails to identify what actions were taken which required the school to give parents prior written notice; paragraph 4 does not identify on what

occasions or what factors relate to the assertion that the school denied parents the right to participate as equal partners; and paragraph 5 does not identify what special education and related services should have been provided and the denial thereof equated in a denial of FAPE." Petitioner was given five days to supplement his statement of the issues.

On October 21, 2005, upon motion by both parties, the Chairperson entered an Order extending the procedural time line such that the hearing was set for January 9 through 12, 2006 with a date of final decision due on February 10, 2006. Further, the Petitioner was granted until November 15, 2005 to submit his specification of issues.

Upon motion, the time line was again continued such that the hearing was set for February 21, 2006 through February 24, 2006 with a final date of decision on April 20, 2006. That Order was issued on November 10, 2005.

On November 23, 2005 Petitioner submitted a supplementation of his specification of issues.

On January 13, 2006 Respondent submitted Respondent's Motion for Summary Judgment and Suggestions in Support Thereof.

On January 27, 2006 Respondent submitted a Motion for Compulsory Observation of Student along with a Brief in support of its motion.

The matter was taken up by conference call with the attorneys on January 31, 2006.

On February 3, 2006 the Chairperson issued an Order compelling Petitioner to submit Student for observation.

On February 6, 2006 Petitioners submitted their Response and Suggestions in Opposition to Respondent's Motion for Summary Judgment.

Respondent submitted its reply to Petitioners' Response on February 9, 2006.

On February 14, 2006 the Chairperson issued an Order denying Respondent's Motion for Summary Judgment.

On February 14, 2006 Respondent submitted its list of prospective witnesses.

On February 15, 2006 Petitioner submitted its list of prospective witnesses.

On February 16, 2006 Respondent submitted its Motion for Continuance.

On February 17, 2006 the Chairperson issued an Order granting the motion for continuance and setting the matter for hearing on April 24 through 28, 2006.

On March 17, 2006 Petitioner submitted a request for a continuance.

On March 22, 2006 Respondent submitted its response to Petitioners' request for a continuance.

On March 24, 2006, after conference with the attorneys, the Chairperson issued an Order setting the matter for hearing on September 18 through 22, 2006.

On September 7, 2006, the Chairperson received a Motion to Disqualify George Wilson as panel member from the Petitioners wherein it was averred that Mr. Wilson has a "personal financial conflict as his continued employment and corresponding salary are determined by, among others, Terry Allee, now a Blue Springs District employee."

On September 8, 2006 Respondent submitted its response to Petitioners' Motion to Disqualify George Wilson.

On September 8, 2006 Respondent submitted its First Motion in Limine wherein it requested to exclude "all issues, evidence and testimony regarding events taking place between May 30, 2005 (the date of the request for due process) and May 30, 2003 (two

years prior to the date of filing) as such matters fall outside the two year statute of limitations created by the IDEA and court cases arising therefrom."

On September 10, 2006 Petitioner submitted its reply to Respondent's Response to the Motion to Disqualify George Wilson as a panel member.

On September 12, 2006 the Chairperson issued an Order denying the request to exclude all evidence occurring outside the two year statute of limitations.

Further, on that same date the Chairperson issued his Order and Memorandum on Denial of Petitioners' Motion to Recuse panel member George Wilson wherein the Chairperson found that "the Petitioner has failed to adequately show actual, professional or personal interest that conflicts with panel member George Wilson's objectivity" and "that Petitioners have failed to show that a reasonable person would find an appearance of impropriety in George Wilson acting as a panel member in the due process hearing."

The due process hearing convened at 9:00 a.m. on September 18, 2006 and was held at the Hal McCarter Building in Blue Springs, Missouri. The hearing continued each day thereafter and concluded on September 22, 2006.

At the conclusion of the due process hearing the parties made a joint motion that they have until December 1, 2006 to submit proposed Findings of Fact and Conclusions of Law and Briefs in support and that a final decision in this case be rendered by February 1, 2007.

The parties have submitted their proposed Findings of Fact and Conclusions of Law and Briefs in support and the panel members have considered those documents accordingly.

III. Findings of Fact

Upon consideration of the testimony and exhibits submitted in this matter, the hearing panel makes the following findings of fact:

1. At the time of the hearing the Student was a seven-year-old child and he and his family reside in the Blue Springs School District. Petitioners first had the Student evaluated by Children's Mercy Hospital in 2002.

2. That evaluation recommended that Student receive language or speech therapy and placement in a pre-school program. That Student was enrolled by his parents in the Parents As Teachers Program in 2002.

3. In October, 2002 the Student was screened by the Parents As Teachers Program. Subsequently, it was determined that Student was eligible to attend the Early Childhood Services Center in the district. In November of 2002 Student was evaluated through assessment at the Early Childhood Services Center. As a result of that assessment, Student was classified "young child with a developmental delay."

4. That on or about December 20, 2002 the parties formulated an IEP based on the evaluations performed the previous month.

5. Student began attending the Early Childhood Services Center in January 2003. That attendance continued through the summer of 2003 and in the beginning of the 2003 - 2004 school year.

6. During this time the parents expressed concerns with the progress of the Student.

7. In November and December of 2003 Student was re-evaluated by the School District.

8. As a result of the re-evaluation, Student received an educational diagnosis as "a child with autism."

9. In accordance with the new diagnosis, Student's IEP was modified by both parents and the District at a December 19, 2003 IEP meeting. This IEP did not include a behavior intervention plan. Thereafter on March 18, 2004 parents provided the District with a written statement of their intention to withdraw Student from the Early Childhood Services Center and to provide education at home. Student ceased attending the Early Childhood Services Center on March 31, 2004. On June 14, 2004 Children's Mercy Hospital performed another evaluation which provided a medical diagnosis of autism. That evaluation made several recommendations, including individualized programming, small group programming, regular classroom programming and occupational therapy, speech therapy and social opportunities outside the family.

10. On August 5, 2004 the District contacted the parents to inquire regarding Student's enrollment in kindergarten at James Lewis Elementary. As a result of that contact, Petitioners requested, on August 20, 2004, an IEP meeting with the District.

11. An IEP meeting was held on August 30, 2004. Present on that date were representatives of the School District, parents, parents' advocate Rand Hodgson, and parents' consultant Nancy Champlin.

12. Nancy Champlin presented the IEP team with Student's present levels of performance and evaluations from the previous summer as well as her observations gleaned from her participation in Student's home schooling.

13. The IEP team met again on September 16, 2004 at which time a draft IEP was presented to parents.

14. The IEP team met again on October 5 and October 22, 2004. By letter dated October 22, 2004 parents consented to the proposed IEP which was provided to them on November 1, 2004. That final IEP called for the preparation of a behavior intervention plan and a safety plan.

15. Arrangements were made between the parents and the District for the parents to view the Student in his proposed learning environment at the District.

16. Upon consultation with their consultant Nancy Champlin, some of which occurred prior to the parents' visit to the School on November 4, 2004, parents chose not to send Student to the School based on their belief that the School's proposed setting was detrimental to Student's learning.

17. The District hired a paraprofessional to work with Student in November of 2004.

18. On December 1, 2004 the parties agreed to a 30 day trial placement at the District in order to observe whether the placement was appropriate for the Student.

19. Student attended the District's kindergarten program for the first time on December 9, 2004.

20. The Student was in the classroom for 9 days prior to Christmas break and returned to the District following Christmas break in January 2005. The parents' consultant Nancy Champlin observed the Student in his classroom setting in December 2004 and January 2005. Pursuant to her criticism an IEP team meeting was convened on

January 21, 2005. Prior to that meeting the District performed observation of Student in his classroom setting.

21. At the January 21, 2005 IEP team meeting, the parties agreed to extend Student's period at the District until the end of 2005.

22. At that meeting the IEP team indicated the District would only allow future observation of Student by the parents to those periods when the District could observe the Student at the same time.

23. At the beginning of February 2005, parents reduced the Student's school day to half time. Student continued in his placement at the District throughout the spring of 2005 and extended school year services were offered to the parents for the summer of 2005. Following the spring semester in 2005, Student ceased to be educated at the District and parents declined to return Student to the District thereafter. Throughout the spring of 2005 the District staff found Student to be making progress under his IEP.

24. Pursuant to the requests of the parents and the parents' representative, certain aspects of what is known as "ABA" were included in Student's IEP. The parents and their representatives participated in all IEP team meetings and, in fact, their input greatly shaped the IEP which was developed by the IEP team before the Student.

25. Upon withdrawal of the Student from the District, the parents did not make a request for reimbursement for home bound services as required under the IDEA.

26. School personnel charged with Student's education had a very limited understanding of the ABA and parents' representatives attended the IEP team meeting to provide education to the IEP team.

27. The parents offered for Nancy Champlin to train the school in ABA training. The District declined this offer.

28. Student remains in a home bound placement and is being educated by his parents.

IV. Conclusion of Law

Under the Individuals with Disabilities Education Act, all children with disabilities are entitled to a free appropriate public education designed to meet their unique needs. 20 U.S.C. § 1412. Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 189, 195 (1982), and does not require "strict equality of opportunity or services." *Id.* at 198. Rather, a local educational agency fulfills the requirement of FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id.* at 203.

The primary vehicle for carrying out the IDEA's goals is the "individualized educational program" ("IEP"). 20 U.S.C. § 1414. Significantly, the IEP is not required to maximize the educational benefit to the child, nor to provide each and every service and accommodation which could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 459 (6th Cir. 1993), *cert. denied*, 128 L.Ed.2d 665 (1994), as stated by the *Rowley* Court, an appropriate educational program is one which is "reasonably calculated to enable the

child to receive educational benefits." *Rowley*, 458 U.S. at 207. Thus, in articulating the standard for FAPE, the *Rowley* Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." *Id.* at 192. The Court concluded that Congress' intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.*; *See also Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997) (finding that IDEA does not require a school district to maximize a student's potential or provide best education possible); *Gill v. Columbia 93 Sch. Dist.*, No. 99-3807 (8th Cir. July 10, 2000) (holding that Missouri requires an appropriate and not a maximizing standard).

With this definition, the Act defines a free appropriate public education ("FAPE") in broad, general terms, without dictating substantive educational policy or mandating specific educational methods. This imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided – with state and local officials." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989) (citing *Rowley*, 458 U.S. at 207)). Second, Congress sought to bring children with disabilities into the mainstream of public school system. *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189.

The FAPE required by the Act is tailored to the unique needs of the disabled child by means of an "individualized education program" ("IEP"). 20 U.S.C. § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local

educational agency, the child's teacher, the child's parents or guardian, and where appropriate, the child, consists of a written document containing:

> (A) a statement of the present levels of educational performance of such child;
>
> (B) a statement of annual goals, including short-term instructional objectives;
>
> (C) a statement of the specific educational services to be provided to such child, and the extent to which the child will be able to participate in regular educational programs;
>
> (D) the projected date for initiation and anticipated duration of such services; and
>
> (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401. Local educational agencies must review, and where appropriate, revise each child's IEP at least annually when the child remains within the jurisdiction of that public agency. 20 U.S.C. § 1414(a)(5).

Significantly, the IDEA does not prescribe any substantive standard regarding the level of education to be accorded to disabled children, *Rowley*, 458 U.S. at 189, 195, *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 611-12 (8th Cir. 1997), and does not require "strict equality of opportunity or services." *Rowley*, 458 U.S. at 198; *Clynes*, 119 F.3d at 612. Rather, a local educational agency fulfills the requirement of providing a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203; *Clynes*, 119 F.3d at 612. Moreover, a critical factor in determining whether a student has received FAPE is whether the student is progressing. *Rowley*, 458 U.S. at 203-04.

Further, the program provided by the IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Rowley*, 458 U.S. at 199; *Clynes*, 119 F.3d at 612. Although an educational benefit must be more than de minimis to be appropriate, *Doe v. Bd. of Educ. of Tullahoma City Schls.*, 9 F.3d 455, 459 (6th Cir. 1993), an appropriate educational program is one that is "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 207. *See also Clynes*, 119 F.3d at 611. In articulating the standard for FAPE, the *Rowley* Court concluded that "Congress did not impose any greater substantive educational standard than would be necessary to make such access meaningful." 458 U.S. at 192. The Court found Congress's intent was "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.*

Given this purpose, the IDEA defines a FAPE in broad, general terms, without dictating substantive educational policy mandating specific educational methods. The imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided – with state and local officials." *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989). Second, Congress sought to bring children with disabilities into the mainstream of the public school system. *Mark A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189. Thus, federal law requires that states educate disabled and non-disabled children to "the maximum extent appropriate." 20 U.S.C. § 1412.

The key inquiry in determining whether a district is providing FAPE is to assess "whether a proposed IEP is adequate and appropriate for a particular child at a given point in time." *Burlington v. Dep't of Educ.*, 736 F.2d 773, 788 (1st Cir. 1984), *aff'd*, 471 U.S. 359 (1985). As stated by one court:

> The IDEA does not promise perfect solutions to the vexing problems posed by the existence of learning disabilities in children and adolescents. The Act sets more modest goals; it emphasizes appropriate, rather than an ideal education; it requires an adequate, rather than an optimal IEP. Appropriateness and adequacy are terms of moderation. It follows that, although an IEP must afford some educational benefit to the handicapped child, the benefit conferred need not reach the highest attainable level or even the level needed to maximize the child's potential.

Lenn v. Portland Sch. Comm., 998 F.2d 1083, 1086 (1st Cir. 1993) (citing *Rowley*, 453 U.S. at 198).

Thus, the determination of whether an IEP is appropriate and reasonably calculated to confer an educational benefit must be measured from the time it was offered to the student. *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1035, 1040 (3d Cir. 1993). As noted by the *Fuhrmann* court, "[n]either the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." 993 F.2d at 1040. Therefore, "events occurring months and years after the placement decisions had been promulgated, although arguably relevant to the court's inquiry, cannot be substituted for Rowley's threshold determination of a 'reasonable calculation' of educational benefit. Therefore, evidence of a student's later educational progress may only be considered in determining whether the original IEP was reasonably calculated to afford some educational benefit." *Id.*

I. THE SCHOOL FAILED TO PROPERLY EVALUATE AND FULLY IDENTIFY THE STUDENT'S NEEDS AND THEREAFTER FAILED TO CRAFT AN APPROPRIATELY DRAFTED IEP FOR THE 2003, 2004 AND CURRENT SCHOOL YEAR.

In determining whether an IEP is adequate, the Panel must first determine whether the District complied with IDEA procedures, including whether the IEP conformed with the IDEA's requirements. Second, the Panel must determine whether the IEP was reasonably calculated to enable Student to receive educational benefit.

The heart of Petitioners' claim herein is that the District failed to properly evaluate the Student's present levels of performance such that further evaluation subsequently was frustrated due to an inability to tell where exactly the Student had started from.

The Panel finds that the parents have not met their burden on this point. The 2003 - 2004 IEP and the 2004 - 2005 IEP show that a statement of present levels of educational performance, a statement of annual goals, including short term instructional objectives, a statement of specific regular educational services to be provided to Student and the appropriate objective criteria at evaluation procedures and schedules for determining on an annual basis whether the instructional objectives were being achieved are included in those IEPs.

Perhaps of even greater importance is the fact that Petitioners were intimately involved in the creation of the IEPs in question. Petitioners' consultant Nancy Champlin attended IEP team meetings and presented her base line findings and Student's present level of performance at those meetings. Further, the School District used and incorporated all evaluations of the Student in its consideration, preparation and

implementation of the IEP in question. The panel finds that the School District properly evaluated Student and, with the addition of the information provided by the Petitioners, adequately included present levels of performance and future indicators within the IEP and accordingly, Petitioners Count I fails.

II. THE SCHOOL FAILED TO PROVIDE PARENTS ADEQUATE PRIOR WRITTEN NOTICE OF THEIR DECISIONS DURING THE PAST THREE YEARS BEGINNING IN THE FALL OF 2003 IN VIOLATION OF 20 U.S.C. SECTION 1415(b) AND (C) AND 34 C.F.R. SECTION 300.503.

The Panel can find no evidence to support the parents' assertion that the School failed to provide prior written notice. Given the lack of any evidence whatsoever that the School failed to give prior written notice, no further discussion is necessary. Petitioners presented no evidence on this issue and therefore the issue is deemed abandoned.

III. THE SCHOOL FAILED TO PROVIDE NECESSARY SPECIAL EDUCATION AND RELATED SERVICES FOR THE PAST THREE SCHOOL YEARS BEGINNING IN THE FALL OF 2003 DESPITE THE STUDENT'S ENTITLEMENT TO THESE SERVICES, INCLUDING, BUT NOT LIMITED TO, ONE ON ONE ABA TYPE SERVICES AND IN SO FAILING DENIED THIS STUDENT A FREE APPROPRIATE PUBLIC EDUCATION REQUIRING THE PARENTS TO OBTAIN THESE SERVICES PRIVATELY AND AT THEIR OWN EXPENSE.

Petitioners assertion that the District failed to properly prepare a behavior intervention program and safety plan is the most compelling claim in this matter.

The IEP developed on December 19, 2003, did not include a behavior intervention plan; the behavior intervention plan included in the October, 2004 IEP was developed without benefit of a formal functional behavioral assessment; and the safety plans included in both IEP's were not highly individualized. The evidence does support that the IEP teams did identify some level of concern regarding the Student's behavior

and safety, which compels the Panel to determine whether the lack of a behavior intervention plan in the 2003 IEP, that a formal functional behavioral analysis was not conducted prior to developing the 2004 behavior intervention plan, and/or the generic tone of the safety plans constitute a denial of a free appropriate education for the Student. The Panel finds that it does not.

This is not the first case where a behavior intervention plan was called for by an IEP team, but was not actually prepared. In *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1029 (8th Cir. 2003) the Eighth Circuit looked at this very issue. As here, the Student had a diagnosis of autism and was prone to inappropriate behavior which prevented him from interacting with his peers in an acceptable manner. Despite his challenging behaviors, the School District did not formulate a behavior management plan as needed. In looking at this issue, the Eighth Circuit first found that the documents submitted by the School District did not, in fact, constitute a behavior management plan. However, under the second prong of the analysis the court also concluded that as a result of the lack of behavior management plan, the Student did not make academic progress. Specifically, the Student, upon each advancement, was required to be moved back a grade because his behaviors would escalate upon advancement. As a result, there was a direct cause and effect showing by the Petitioners there that the District failed to provide the Student an educational benefit by not developing and implementing an appropriate behavior management plan as required by the IEP.

This is precisely the evidence which Petitioners here have failed to present to the Panel. The District has adequately shown that it provided the Student with an educational benefit. His teacher, Beth Tabler, testified that the Student made adequate

progress in both academic and social areas while she taught him. Randy Clow testified that the Student made progress in his speech while he implemented the IEP.

In fact, all educators testified that the Student made adequate progress. Additionally, the testimony and evidence demonstrated that the Student's behaviors which interfered with his learning and/or that of others were comparatively mild and easily controlled in the school setting. The school's failure to conduct a formal functional behavioral analysis is mitigated by the extensive assessment information it obtained, together with the amount of information about the Student's behavior it obtained from the parents as well as from the parent's consultant. Similarly, the Student's need for a more detailed safety plan was not substantiated by the evidence. Certainly, the testimony and evidence did not demonstrate that the Student's right to a free appropriate public education was impeded nor did he suffer any deprivation of educational benefit as a result of these claims. Petitioners, therefore, failed to meet their burden that the IEP's were not reasonably calculated to provide the Student with an educational benefit.

IV. OVER THE SAME TIME PERIOD SET FORTH ABOVE THE SCHOOL DENIED THE PARENTS THE RIGHT TO PARTICIPATE AS EQUAL PARTNERS IN THE IEP PROCESS BY FAILING TO FAIRLY CONSIDER THE PARENTS REPEATED REQUESTS IN VIOLATION OF *BOARD OF EDUC. OF HENDRICK HUDSON CENTRAL SCHOOL DIST., WESTCHESTER COUNTY V. ROWLEY,* 458 U.S. 176, 206-207 (1982), *DOV. HAMILTON CO. BD. OF EDUC.,* 392 F.3d 840, 858 (6th Cir. 2004), AND *INDEPENDENT SCH. DIST. NO. 283 V. S.D.,* 88 F.3d 551, 562 (8th Cir. 1996) WHICH HELD THAT PROCEDURAL VIOLATIONS OCCURRED DEMANDING RELIEF "WHEN THE PARENTS OPPORTUNITY TO PARTICIPATE IN THE IEP PROCESS IS SERIOUSLY HAMPERED.

The records show that the School District took all necessary actions in order to ensure the parents' participation as equal partners in the IEP process. The parents, in fact, retained an advocate, Rand Hodgson, and a consultant, Nancy Champlin, who

participated in the IEP team meetings and in the development of the IEP itself. The record shows that on numerous occasions had substantial contact in both a formal and informal manner with members of the IEP team to discuss the development of the IEP itself. In fact, the record shows that the parents and their representatives had a substantial impact on the development of the IEP itself as well as the subsequent changes to the IEP. Accordingly, the Petitioners have failed to show that the School has "denied the parents the right to participate as equal partners in the IEP process."

In light of the foregoing the Panel makes these final conclusions:

1. The Panel concludes that the District compiled sufficient data and information to properly evaluate Student. The Panel further finds that the District correctly assessed Student's disability and developed appropriate IEPs during the2003, 2004 and 2005 school years.

2. The Panel further finds that the IEPs developed for Student were reasonably calculated to provide, and did actually provide Student with educational benefits.

3. The Panel further finds that Student made progress on the goals and objectives contained in his IEPs.

4. The Panel further finds that the District provided a FAPE to Student during the 2003, 2004, and 2005 school years.

5. The Panel further finds that because the District provided Student with a FAPE during those years, the Parents are not entitled to reimbursement. The Panel therefore denies reimbursement.

6. The Panel concludes that, although the 2003, 2004 and 2005 IEPs contained some inadequacies, the IEPs were reasonably calculated to provide Student with educational benefit and that any inadequacies are de minimus.

7. The Panel denies reimbursement for the Petitioners proposed home bound placement because home bound placement was and remains too restrictive a placement and is, therefore, not appropriate.

8. The Panel further finds that the Parents never rejected Student's IEP and never furnished written notice to the District of their intent to unilaterally place Student in a private setting and seek reimbursement. By failing to do so, the Panel finds that the Parents failed to comply with the statutory imperatives for reimbursement. The Panel, therefore, denies the Parents' claim for reimbursement.

V. Decision and Order

The Panel unanimously concludes that the IEPs developed by the School District were reasonably calculated and did, in fact, provide the Student with a free appropriate public education. The Panel unanimously finds that while procedural deficiencies may have existed in the IEP process and in the IEPs developed, those procedural deficiencies did not rise to a level which impacted the Student's provision of FAPE. Accordingly, the Panel unanimously finds in favor of the District with respect to all issues.

APPEAL DECISION

This is the final decision of the Department of Elementary and Secondary Education in this matter. A party has a right to request a review of this decision pursuant to the Missouri Administrative Procedures Act § 536.010 RSMo. A party also has a right

to challenge this decision by filing a civil action in federal or state court pursuant to the IDEA. See 20 U.S.C. § 14, 15(i).

Dated:_____, 2007

_____

Joshua E. Douglass
Due Process Hearing Chairperson

Concurring Panel Members:

Ms. Beth Mollenkamp
Mr. George Wilson

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was faxed and mailed, postage prepaid, by First Class United States mail, to the attorneys of the parties of record at the address set out below, on this ____ day of _____, 2007:

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